

Testimony by Andrew Feldman
Executive Assistant, Dept. of Workforce Development
Before the Committee on Labor
March 24, 2010

Good afternoon. My name is Andy Feldman and I am the Executive Assistant at the Wisconsin Department of Workforce Development. Seated next to me is Hal Bergan, the administrator of the Unemployment Insurance Division.

On behalf of Secretary Gassman, I'd like to thank Chairperson Sinicki and the members of the Committee for allowing us to testify today in favor of Assembly Bill 884, legislation that makes various changes to Wisconsin's Unemployment Insurance (UI) program.

AB 884 is the product of the deliberations of the state's Unemployment Insurance Advisory Council, a ten member body comprised of employee and employer representatives. The bill was approved by the Council by a vote of 9-0, with one member absent who supports the bill.

To provide some brief background, this has been a challenging year for the Unemployment Insurance program. With a deep national recession, the program has provided benefits to a record number of Wisconsin citizens—currently about 245,000 individuals. In 2009 the program paid out \$3.1 billion in benefits, compared to just under \$1 billion in 2007, helping support Wisconsin workers and families and adding valuable spending to local communities.

In the face of these challenges, we have worked hard to maintain and improve customer service by improving processes, adding staff and phone lines, adding hours of service, and other improvements. These actions have ensured that most Wisconsinites applying for benefits receive their first check quickly, within a week, and wait times on the phones have fallen dramatically.

With that background, the bill before you makes further improvements to the UI program, including both administrative and substantive issues. From an administrative standpoint, it streamlines some processes and makes changes that add consistency to the program. These changes will benefit claimants and employers.

Much of the bill is identical to the provisions of AB 487, which passed the Assembly earlier this year. AB 884 also includes some new provisions that make important substantive improvements in the law. Specifically, the bill includes provisions dealing with the following issues.

- The definition of an employee or an independent contractor.
- An exclusion from coverage for an individual providing personal care and/or companionship to a family member

- Consistency and clarification in the law relating to approved training and extended training
- Assurance requirements for Native American tribes
- And a change relating to voluntary contributions for employers sustaining catastrophic disruption of business

The bill does not include significant changes to affect the solvency of the UI Reserve Fund. The Council knows that changes will be needed in the future, but believes that this is not the best time to enact those changes. In a letter to Rep. Sinicki and Senator Coggs from March 4th of this year, Phil Neuenfeldt, Legislative Director of the Wisconsin State AFL-CIO, and James Buchen, Vice President of Wisconsin Manufacturers & Commerce, stated: "...at this point in the economic cycle we do not believe it would be prudent to increase taxes or reduce benefits. Neither employers nor laid off employees are in a position to shoulder an additional economic burden at this time." The Department concurs in those sentiments.

Thanks again for the opportunity to address the Committee. Hal Bergan will now provide some more detailed explanation of the bill, with special emphasis on the provisions that have been added since last fall.

Testimony of Hal Bergan
Administrator of the Unemployment Insurance Division
On Assembly Bill 884, relating to changes in
Wisconsin's Unemployment Insurance Law
March 24, 2010

Chairperson Sinicki and members of the Committee: I appreciate the opportunity to be here this morning to testify in support of Assembly Bill 884. My task today is to describe the provisions of this bill, with special emphasis on those provisions which were added to Assembly Bill 487 since it was before the Committee in October. Before I move to the new provisions I want to highlight again a couple of provisions that are carried over from the previous bill that are of particular relevance.

Amend Reduction of Benefits for Lump Sum Pension Distributions

Pension payments reduce the amount of unemployment (UI) benefits in the weeks in which a pension payment is received. §108.05. Current law requires that a pension payment that is received by a claimant other than on a periodic basis (a lump sum payment) be allocated to a series of weeks and reduces the amount of UI benefits in those weeks. The change will treat the lump sum pension payment as having been paid in full, rather than allocated, only in the week in which it is paid. The effect will assure that a UI benefit will be reduced as a result of the lump sum payment in no more than a single week. This provision originated with Rep. Terry Van Akkeran.

Enable Intercept of Federal Tax Refunds for UI Fraud

The bill amends §108.22(8) to enable the intercept of federal tax refunds to collect UI benefit overpayments in fraud cases and to permit the U.S. Department of Treasury to deduct fees from intercepted amounts to cover the administrative costs of the intercept program. The department estimates that the change will increase revenue to the unemployment reserve fund by \$1.3 million annually.

NEW PROVISIONS

Harmonize Approved Training and Extended Training

Claimants may be eligible for unemployment benefits while they are enrolled in certain approved training programs. Claimants who exhaust all rights to benefits and are enrolled in an approved training course that meets certain qualifications also potentially qualify to receive up to 26 weeks of additional benefits while enrolled in that training. The bill broadens the types of training considered approved training to include recently created department programs, harmonizes the requirements for benefits under the regular approved training and extended training programs, prohibits benefit disqualifications and reductions when claimants are enrolled in certain federally funded training programs, adds new federally-required protections for claimants in certain federally funded training programs, and shifts charges for claimants in approved training to the balancing account. The bill also allows the department to determine whether a claimant is enrolled in approved training before determining whether a claimant meets certain other requirements to receive benefits, enabling faster payment of benefits. §§108.04(16) and 108.06(7).

Modify limitations on voluntary contributions

Create exception to the statutory limitations on voluntary contributions. §108.18(7). Under current law an employer may make a voluntary contribution to its UI reserve account. The law limits the amount of such voluntary contributions such that the employer cannot buy down its tax rate by more than a single tax rate level each year. Reason for the limit: While the effect of this limit is revenue neutral to the employer's account, the voluntary contributions result in lower solvency tax rate levels and therefore, buying down tax rates by voluntary contributions will generate lower solvency contributions for employers than they otherwise would pay.

The change will exempt the employer from the limit on the voluntary contribution amount under circumstances where that employer has suffered physical damage to its business caused by a catastrophic event and through no primary fault of its own, and incurs benefit charges for layoffs due to the physical damage to the business. The change will allow the employer to make payments to restore its reserve account balance and tax rate, and will essentially allow an employer to be made whole vis-à-vis its unemployment tax rate after a catastrophe. An employer must submit proof that workers were laid off due to the catastrophic event.

Repeal Assurance Requirement Imposed on Indian Tribes

Government, nonprofit and tribal government employers are permitted to reimburse the unemployment reserve fund for unemployment benefits paid on their accounts, rather than pay quarterly contributions. Currently, nonprofit and tribal government employers must provide financial security ("assurance" in the form of a deposit account or bond) for those employers' statutory reimbursement obligations. The bill repeals the statutory provisions requiring Indian tribes to provide the financial security. Other local governments are not required to post an assurance. §108.152.

Exclude from "Employment" Personal Care Services Performed by an Individual for Family Members

The bill eliminates unemployment contributions and benefits for an individual providing personal care and companionship services directly to the individual's family member. §108.02(15)(km).

Improve Definition of "Employee"

The UI bill passed two years ago required the UI Advisory Council to review the current definition of "employee". The Council appointed a subcommittee consisting of Dennis Penkalski from the labor side and Ed Lump from the employer side and Dan LaRocque, the Council chairperson. They met for many hours on this topic and the Council agreed with their recommendations.

Essentially this is a provision that governs which workers are covered by unemployment insurance and which are not. Our current language has been in place since 1996, with a modest change in 2000. Since then there have been many decisions by adjudicators, administrative law judges, and the Labor and Industry Review Commission. The language proposed in the bill is meant to update the statute and clarify the requirements. We do not expect that this new test will greatly change the equation in determining who is an independent contractor and who is an employee. It should, however, make the law easier to apply and interpret. It is the Department's intention to significantly increase our efforts to educate employers about these definitions in order to avoid inadvertent violations of the provisions.

The scope of unemployment insurance coverage of workers is largely determined by the definition of "employee" in the unemployment insurance law. The bill amends the seven-of-ten test, §108.02(12)(bm), for (definition of) "employee" that applies to workers performing services for for-profit employers other than employers of truckers and loggers. The changes:

- a. Import several factors that have been regarded as sound indicators of proper employee classification by the courts and Labor and Industry Review Commission. These factors were applied to for-profit employers in Wisconsin prior to the creation of the seven-of-ten test in the 1990s and have been part of the longstanding test for nonprofit and government employers.
- b. Eliminate several factors that have diluted the test, made it less effective and encouraged manipulation and modify factors that have confused the public and the agencies administering the law.
- c. Improve clarity, predictability and fairness, by using simpler and clearer language and by eliminating the confusion that has arisen from combining dissimilar factors.
- d. Restore a balance between the two basic elements of the test for "employee": freedom from control and direction and independently established business.
- e. Retain intact three factors that have been observed to be working well and are relatively well understood, as shown by the experience of the department and the decisions of the Commission.
- f. Maintain the flexibility of application that the seven-of-ten percentage allows.

The current seven-of-ten test for "employee" and proposed amendments

Wis. Stat. §108.02(12)(bm) provides that an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker, is **not an employee** (i.e., is an independent contractor) if the employing unit satisfies the department that the individual meets 7 or more of the 10 factors. As amended the employer must satisfy the first, new factor and 6 of the other 9 factors. The current ten-part test is shown below. Proposed amendments are shown in bold.

1. The individual holds or has applied for an identification number with the federal internal revenue service **[to be repealed by this bill]**.
2. The individual has filed business or self-employment income tax returns with the federal internal revenue service based on such services in the previous year or, in the case of a new business, in the year in which such services were first performed **[to be repealed by this bill]**.

[This bill will add "freedom from control or direction" and make it an essential element of the ten criteria to any determination in favor of an employer under this test. The statute will read:

- 1. The services of the individual are performed free from control or direction by the employing unit over the performance of his or her services.**

In determining whether services of an individual are performed free from control or direction, the department may consider the following nonexclusive factors:

- a. **Whether the individual is required to comply with instructions concerning how to perform the services.**
- b. **Whether the individual receives training from the employing unit with respect to the services performed.**
- c. **Whether the individual is required to personally perform the services.**
- d. **Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit.**
- e. **Whether the individual is required to make oral or written reports to the employing unit on a regular basis.]**

[As amended by this bill, the ten-part test will require that the employer establish that the individual worker meets 6 or more of the following 9 conditions:

- 2. **[This factor in the test will be added by this bill: The individual advertises or otherwise affirmatively holds himself or herself out as being in business.]**
- 3. **The individual maintains a separate business with his or her own office, equipment, materials and other facilities [replaced with: The individual maintains his or her own office, or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.].**
- 4. **The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and methods of performing such services [replaced with: The individual operates under multiple contracts with one or more employing units to perform specific services.].**
- 5. **The individual incurs the main expenses related to the services that he or she performs under contract [retained unchanged as a factor in the test].**
- 6. **The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services [replaced with: The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.].**
- 7. **The individual receives compensation for services performed under a contract on a commission or per-job or competitive-bid basis and not on any other basis [repealed by this bill and replaced with a new factor: The services performed by the individual do not directly relate to the employing unit retaining the services.].**
- 8. **The individual may realize a profit or suffer a loss under contracts to perform such services [retained unchanged as a factor in the test].**
- 9. **The individual has recurring business liabilities or obligations [retained unchanged as a factor in the test].**
- 10. **The success or failure of the individual's business depends on the relationship of business receipts to expenditures [repealed by this bill and replaced with: The individual is not economically dependent upon a particular employing unit with respect to the services being performed.].**

Amend Exceptions to Quit Disqualifications: Change Thresholds to 32 Hours

Two quit exceptions, §§108.04(7)(k) and 108.04(7)(o), apply where a claimant works two jobs concurrently. Section 108.04(7)(k) allows a claimant to quit a job providing up to 30 hours per week without disqualification where the claimant has lost a full-time job and it is "economically unfeasible" to continue the 30-hour per week work. Section 108.04(7)(o) allows a claimant to quit a job where the claimant quits before receiving notice of termination from a 30-hour per week job. The proposal would change the 30-hour threshold to 32 hours in each provision.

Amend Disqualification for Full-Time Work with 80% Liable Employer: Reduce "full-time" from 35 to 32 Hours

When a claimant works for an employer that paid at least 80% of the wages in the claimant's base period, the law disqualifies the claimant from receiving benefits in any week that the wages are for full-time work at a rate of pay that is the same or greater than the claimant earned in the highest paid quarter of the base period. The proposal would change "full-time" for this purpose, §108.05(3)(b), from 35 hours to 32 hours. First applies in July 2011.

Treat Bonus Payments as "Earned" When Paid

A bonus payment that is earned in a week of UI benefit eligibility will reduce the amount of UI benefits. The department must investigate and determine what week a bonus payment has been "earned". The change will clarify that a bonus is earned in the week in which the bonus is paid by the employer. The change will simplify administration and reinforce the department's interpretation of the current law that generally considers a bonus payment to be earned in the week in which it is paid. §108.05(3)(e).

Establish Firm Deadline for Voluntary Contributions

The bill conforms the provision on timeliness for payment of voluntary contributions to the provision on timeliness for reports and contributions generally and enables greater administrative efficiency. §108.18(7)(d).

Amend Special Assessment for Interest to Allow Unused Balance to Revert to Reserve Fund

The bill amends provisions on special assessment of employers for interest on federal borrowing to permit the department to credit the balancing account with any amounts from the special assessment that exceed amounts necessary to pay interest on federal loans. §§108.19(1m) and 108.20(3).

Clarify Exceptions for Exclusions from Employment for Indian Tribes

The bill clarifies that the option for tribes to exclude certain tribal elected officials and policymakers and advisors from coverage is made under tribal not state law, and that tribal legislative bodies and judiciaries are not political subdivisions of the state. §108.02(15)(f). The bill clarifies that individuals receiving work relief or work training programs funded by tribes is excluded from employment unless a tribe elects otherwise. §108.02(15)(g)1.

Clarify that the Department is an "Adverse Party" in Employers' Circuit Court Actions to Review Tax Decisions

The bill reinforces the interpretation of §108.10(4) that the department is an "adverse party" when an employer seeks review in the circuit court of a Labor and Industry Review Commission decision. The change will reduce confusion by employers as to which entity must be a named party; reduce risk to employers of technical dismissal of their cases; and assure the department will be afforded an opportunity to defend its determination and affect the judicial development of the unemployment law.

Incorporate Requirement that Professional Employer Organizations (PEOs) Register with Department of Regulation & Licensing

The bill amends §108.02(21e) to include in the definition of "professional employer organization" the requirement that it be registered with the Department of Regulation and Licensing.

Correct Forfeiture Language to Reflect Statutory Penalties

The bill makes a technical change to §108.04(11)(be), a provision that prescribes monetary penalties ("forfeitures") where claimants engage in concealment of work, wages and other matters. Prior legislation inadvertently contained language ("and be disqualified for benefits") incorrectly suggesting additional sanctions were intended. Other existing provisions clearly and effectively compel a claimant to repay overpaid benefits, which assures that concealment will not result in retention of fraudulently obtained benefits. The correction to remove the words "and be disqualified for benefits" will eliminate the possibility of unintended disqualification for benefits.

Protect Claimants and Witnesses in UI Cases from Retaliation

The bill strengthens protection of claimants and creates protection of witnesses in unemployment insurance cases from retaliation by employers for asserting their rights or appearing as a witness in an unemployment hearing and increases certain penalties. §108.24.



WMC
WISCONSIN'S BUSINESS VOICE

TO: Members of the State Assembly Labor Committee

FROM: James A. Buchen, Vice President of Government Relations, Wisconsin Manufacturers and Commerce
Phil Neuenfeld, Secretary-Treasurer of the Wisconsin State AFL-CIO

DATE: March 24, 2010

RE: Assembly Bill 884 Support for Unemployment Insurance Advisory Council Reform Recommendations

Background

We currently serve as Labor and Management Representatives on the Wisconsin Unemployment Advisory Council (UIAC). Wisconsin and the nation have faced unprecedented economic challenges in recent years. The nation's unemployment insurance system has faced even greater challenges, continuing to pay unemployment benefits to millions of Americans, including unprecedented numbers here in Wisconsin.

The Wisconsin Unemployment Advisory Council recommended changes to the employer tax structure and employee eligibility requirements two years ago. The Legislature enacted those changes with the expectation that they would improve the solvency of the Wisconsin Unemployment Insurance system. However, the intervening economic collapse of business and industry depleted all of the Wisconsin UI Trust Fund reserves, and borrowing from the Federal Government to pay state UI benefits has been continuing for over a year.

During this period the UIAC has continued to monitor the Trust Fund solvency. We have considered various approaches to address the solvency situation. However, the Management and Labor Representatives jointly concluded that it is not timely to take further steps that would adjust either the tax or benefit structure. We need to analyze any further steps, if any, Congress may take to address the UI situation nationally that might impact the direction of state UI policy.

However, we have negotiated a package of law changes that is before you today. There are no dramatic provisions in this legislation, and many of them already came before this Committee late last year for consideration.

First, we are proposing law changes that will make the definition of full time employment consistent throughout the statute. Particularly during this period of high claims volume these changes will make administration of the UI Act simpler for those on the front lines of determining benefit eligibility.

Recommendations impacting employers include clarifying the deadline for employers making voluntary tax contributions that will reduce their tax rates. We have also recommended a law change to the voluntary contribution statute that addresses companies with high claims volume where they temporary closing is due to a natural disaster, such as occurred with the Patrick Cudahy Company in 2009.

Additional recommended law changes permit the UI Division to collect benefit overpayments from Federal tax refunds, and protections for UI claimants and witnesses from workplace retaliation. Again, we believe that these changes will improve administration of the UI Act.

A final recommendation is in the definition of what constitutes an employee under the Wisconsin Unemployment Insurance Act. Currently, in order to establish the status as an independent contract and individual must meet at least seven parts of a ten part test. In an effort to simplify this test, the Council is recommending a nine part test of which the contractor must meet six parts of the test. In addition, changes to the remaining tests are proposed based upon more recent decisions of the Wisconsin Labor and Industry Review Commission that we believe will clarify this part of the UI Statute.

In closing we appreciate the long standing consideration that the Assembly Labor Committee has extended to the UIAC and to the agreed bill process under both Democrat and Republican Chairs. The Council Members appreciate the guidance that, from time to time, the Chairs have provided to the UIAC during the period of the Council's deliberations so that when we bring a bill forward for your review and approval it receives expeditious consideration.

Re: AB 884

Unemployment Insurance Advisory Council

March 4, 2010

Senator Spencer Coggs
Chair, Senate Committee on Labor, Elections, and Urban Affairs
State Capitol - 123 South
Madison, WI 53708

Representative Christine Sinicki
Chair, Assembly Committee on Labor and Industry
State Capitol - 114 North
Madison, WI 53708

The Unemployment Insurance Advisory Council has been carefully monitoring the finances of the UI system throughout the current recession. As expected during an economic downturn, benefit payments currently far exceed tax collections. As a result Wisconsin and more than thirty other states must borrow money from the Federal Government to pay benefits. The system is set up to accommodate such borrowing and Wisconsin has utilized this option in the past during severe economic downturns. As the recession eases, benefit payments will drop and eventually tax collections will once again exceed benefit payments allowing us to pay off our loan over time.

As a result of actions taken by the UI Council and the Legislature last session the taxable wage base increased in 2009 and will increase again in both 2011 and 2013. These changes will increase tax collections significantly. In addition, overall tax rates were automatically increased under existing law beginning in January 2010.

Under current Federal law, Wisconsin will start paying interest on our outstanding loan balance in 2011. At that time employers will be subject to a special assessment in addition to of their UI taxes to pay the interest. As a result, we believe it will be desirable at some point to adjust taxes and/or reduce benefits to pay off the loan as quickly as possible.

However, at this point in the economic cycle we do not believe it would be prudent to increase taxes or reduce benefits. Neither employers nor laid off employees are in a position to shoulder an additional economic burden at this time.

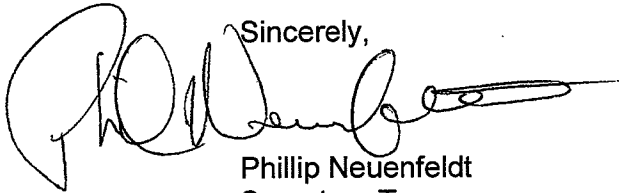
Thirty-two States are currently borrowing to finance UI benefit payments and face a similar set of policy choices in the months ahead. Congress has made a number of adjustments to the Federal laws governing the system including a delay in charging interest on loans and various benefit extensions. Further modifications are likely. Temporarily delaying any potential state policy changes relating to system solvency will give us time to fully understand how Congress intends to address state borrowing issues going forward.

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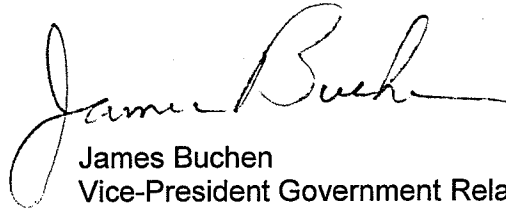
The Unemployment Insurance Advisory Council will continue to closely monitor the finances of the UI system and the strength of the economic recovery in the months ahead. We hope to be in a position to recommend appropriate policies to address system solvency in early 2011 for consideration by the legislature at that time.

If you have any questions about our decision or would like to further discuss any of these issues we would be happy to meet at your convenience.

Sincerely,



Phillip Neuenfeldt
Secretary-Treasurer
AFL-CIO



James Buchen
Vice-President Government Relations
Wisconsin Manufacturers and Commerce